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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

MALIBU MEDIA, LLC, Plaintiff, v. JEFFREY CLABURN, Defendant.	Civil Case No. 3:15-cv-06652-MLC-TJB

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS [CM/ECF 16] AND BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(1) [CM/ECF 14]

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I. INTRODUCTION

The Video Privacy Protection Act (the "Video Privacy Act"), 18 U.S.C. § 2710, has no bearing on the instant lawsuit. Defendant is not a "consumer" within the meaning of the Video Privacy Act and the Video Privacy Act is not a basis for granting a motion to dismiss; it is a separate cause of action.[1] Additionally, although titled as a 12(b)(1) motion to dismiss, Defendant makes no argument that this Court lacks subject-matter jurisdiction nor can he since Plaintiff's copyright infringement lawsuit was properly filed. Finally, even if the Court construes Defendant's Motion as a 12(b)(6) motion to dismiss for failure to state a claim, Defendant's Motion still fails. Plaintiff's complaint states a plausible claim for relief. No court in the country has ever held to the contrary and dismissed Plaintiff's complaint under Rule 12(b)(6). For the foregoing reasons, as explained more fully below, this Court should deny Defendant's Motion.

II. FACTS

Plaintiff's investigator – IPP International UG – recorded Defendant's IP Address distributing twelve (12) of Plaintiff's movies between February 23, 2015 and July 24, 2015. Each infringement occurred using a popular peer-to-peer file sharing system called BitTorrent. Plaintiff filed its action for copyright infringement on September 3, 2015. On February 11, 2016, after receiving Defendant's

[1] Plaintiff does not concede that it is subject to the Video Privacy Act. 18 U.S.C. § 2710.

identifying information pursuant to Plaintiff's court-approved third party subpoena, Plaintiff amended its complaint to name Defendant and proceeded to serve him on February 18, 2016. Defendant's brief in support of his motion to dismiss was filed on May 26, 2016 and his motion to dismiss was filed on July 18, 2016.

III. LEGAL STANDARD

"At issue in a Rule 12(b)(1) motion is the court's 'very power to hear the case' . . . In this case, the question does not concern the court's power to hear the case - - it is beyond cavil that a federal district court has the authority to review claims arising under federal law[.]" *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. Pa. 2006). On the other hand, "[a] Rule 12(b)(6) motion . . . tests the legal sufficiency of plaintiff's claim. In other words, for purposes of resolving a Rule 12(b)(6) motion, the question is whether the plaintiff would be able to prevail even if she were able to prove all of her allegations." *Id.*

"For a complaint to survive dismissal, it 'must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.''" *Malibu Media v. Rahusen*, 2015 U.S. Dist. LEXIS 61676, *3 (D.N.J. May 11, 2015) (*quoting Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)). The Third Circuit has created a two-part analysis for a Court to evaluate whether specific facts have been pled for a plausible claim for relief. "First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions." *Fowler v. UPMC Shadyside*, 578 F.3d 203, 210-11 (3d Cir. 2009). "Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'" *Id.*

IV. ARGUMENT

a. The Video Privacy Protection Act (the "Video Privacy Act"), 18 U.S.C. § 2710, has no Bearing on the Instant Lawsuit

i. Defendant is Not a "Consumer" Within the Meaning of the Video Privacy Act

The Video Privacy Act provides that "[a] video tape service provider who knowingly discloses . . . personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person for the relief provided in subsection (d)." 18 U.S.C. § 2710(b)(1). A "consumer" is defined as "any renter, purchaser, or subscriber of goods or services from a video tape service provider." *Id.* at 2710(a)(1). Assuming *arguendo* that Plaintiff falls within the definition of "video tape service provider," Defendant is *not* a "consumer" within the meaning of the Act.

Malibu Media's content is hosted online at www.x-art.com, a subscription based website which provides access to photos and videos to its paying subscribers. As Defendant points out, "Malibu Media has [paying] subscribers, who are able to stream from X-Art's catalog through its website over a browser, and are also able to download copies of its featurettes for their personal viewing at their leisure." ECF No. 14, at p. 18. Even if Malibu Media's paying subscribers constitute "consumers for purposes of section (a)(1) of the Act", Defendant, Jeffrey Claburn, is *not* one of those subscribers. *Id.* "Conventionally, 'subscription' entails an exchange between subscriber and provider whereby the subscriber imparts money and/or personal information in order to receive a future and recurrent benefit, whether that benefit comprises, for instance, periodical magazines, club membership, cable services, or email updates." *Austin-Spearman v. AMC Network Entm't LLC*, 98 F. Supp. 3d 662, 669 (S.D.N.Y. 2015) (plaintiff was not "consumer" within the meaning of the Video Privacy Act because she was not a renter, purchaser, or subscriber).

> Whatever the nature of the specific exchange, what remains is the subscriber's deliberate and durable affiliation with the provider . . . these arrangements necessarily require some sort of ongoing relationship between provider and subscriber . . . generally undertaken in advance and by affirmative action on the part of the subscriber, so as to supply the provider with sufficient personal information to establish the relationship and exchange.

Id. At no time relevant to this lawsuit did Defendant have the requisite relationship with Plaintiff necessary to categorize him as a "renter, purchaser, or subscriber" of Malibu Media's content.[2] Prior to this lawsuit Plaintiff and Defendant were

[2] Indeed, if Defendant was a paying subscriber of Plaintiff's online content it would have been pointless for Defendant to use BitTorrent to download Plaintiff's content illegally and this lawsuit would never have been filed.

complete strangers. In light of the foregoing, the Video Privacy Act does not afford Defendant any protection and is wholly inapposite to the instant case.

ii. Section (d) Does Not Bar Plaintiff From Pursuing This Case

Defendant claims that "Section (d) of the Act deals the deathblow to Malibu Media. Under the plain language of section (d), no matter who obtains Private Video Information, or how they obtain it, they can't introduce it in Court—and therefore use it as the factual basis for its Complaint." ECF No. 14, p. 20. As demonstrated above, however, the Video Privacy Act only protects the "personally identifiable information" of "*consumers*" of "video tape service providers." Because Defendant is not a "consumer" of Malibu Media's content, the Act does not bar use of Defendant's "personally identifiable information" from being "received in evidence in any trial, hearing, arbitration, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the United States[.]" 18 U.S.C. § 2710(d). Again, the Act has no application to this case.

b. Violation of The Video Privacy Act is a Separate Cause of Action, Not Grounds for Granting a Motion to Dismiss

The Video Privacy Act states that "a video tape service provider who knowingly discloses, to any person, personally identifiable information concerning any consumer of such provider shall be liable to the aggrieved person[.]" 18 U.S.C. § 2710(b)(1). It further states that "any person aggrieved by any act of a person in violation of this section may bring a civil action in a United States district court." *Id.* at 2710(c)(1). "[O]nly those persons 'aggrieved' by an act in violation of the VPPA may bring a civil action, and one can only be 'aggrieved' for purposes of the statute when a VTSP 'knowingly discloses' his or her 'personally identifiable information.'" *In re Nickelodeon Consumer Privacy Litig.*, 2014 U.S. Dist. LEXIS 91286, *30 (D.N.J. July 2, 2014). The Act provides a cause of action to be brought independently or as a counterclaim; it does not provide a basis for dismissal of Plaintiff's copyright infringement complaint.

Defendant's Motion, although titled as a 12(b)(1) motion to dismiss, does not argue that the Court lacks jurisdiction over the case. "At issue in a Rule 12(b)(1) motion is the court's 'very power to hear the case' . . . In this case, the question does not concern the court's power to hear the case - - it is beyond cavil that a federal district court has the authority to review claims arising under federal law[.]" *Petruska v. Gannon Univ.*, 462 F.3d 294, 302 (3d Cir. Pa. 2006). Defendant's argument under the Video Privacy Act also does not support a motion to dismiss under Rule 12(b)(6). "A Rule 12(b)(6) motion . . . tests the legal sufficiency of plaintiff's claim. In other words, for purposes of resolving a Rule 12(b)(6) motion, the question is whether the plaintiff would be able to prevail even if she were able to prove all of her allegations." *Id.* Even if the Video Privacy Act applied and Plaintiff violated it, neither of which is the case here, Plaintiff's complaint still states a plausible claim for relief under Rule 12(b)(6) as set forth in further detail below. Accordingly, Defendant's citation to the Video Privacy Act as a grounds for dismissal fails as a matter of law.

c. Plaintiff's Complaint States a Plausible Claim for Relief[3]

"[I]t takes no great imagination to see how evidence that a file was downloaded by a certain IP address could support a plausible claim that the file was downloaded by the subscriber at that IP address." *Patrick Collins, Inc. v. Osburn*, PWG-12-1294, 2014 WL 1682010 (D. Md. Apr. 28, 2014). "To establish copyright infringement, [all that one must prove is] ownership of [a] valid copyright and copying of constituent elements of the work that are original." *Feist Publications, Inc. v. Rural Telephone Services, Co., Inc.*, 111 S.Ct. 1282, 1296 (1991). Plaintiff plead a prima facie case of infringement. The complaint properly pleads ownership of valid copyrights: "Plaintiff is the registered owner of the copyrights set forth on Exhibit B (the "Copyrights-in-Suit"). ECF No. 1, at ¶ 3. *See also* ¶ 29 ("Plaintiff is the owner of the Copyrights-in-Suit . . . each of which covers an original work of authorship.").

The complaint also properly alleges copying by the Defendant. "Plaintiff's

[3] It is unclear whether Defendant actually challenges Plaintiff's complaint pursuant to Rule 12(b)(6). *See* ECF No. 14, at p. 22 ("None of this is to dispute Plaintiff's claims, or assert factual claims that are not public knowledge for purposes of a 12(b)(6) motion, but simply to help explain how meager and speculative the factual claims of the Plaintiff really are.")

investigator, IPP International UG, established a direct TCP/IP connection with Defendant's IP address as set forth on Exhibit A." *Id.* at ¶ 18. "IPP International UG downloaded from Defendant one or more bits of each of the digital movie files identified by the file hashes on Exhibit A." *Id.* at ¶ 19. "Defendant downloaded, copied, and distributed a complete copy of Plaintiff's movies without authorization as enumerated on Exhibit A." *Id.* at ¶ 20. "By using BitTorrent, Defendant copied and distributed the constituent elements of each of the original works covered by the Copyrights-in-Suit." *Id.* at ¶ 30. "Plaintiff did not authorize, permit or consent to Defendant's distribution of its works." *Id.* at ¶ 31. "As a result of the foregoing, Defendant violated Plaintiff's exclusive [copy]right[s]. *Id.* at ¶ 32.

Even if only a small piece of a copyrighted work is infringed, Defendant has still committed copyright infringement. *See e.g. Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792, 800 (6th Cir. 2005); *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985) ("a taking may not be excused merely because it is insubstantial with respect to the infringing work."); *Meeropol v. Nizer*, 560 F.2d 1061, 1071 (2d Cir. 1977) ("[a]lthough these letters represent less than one percent of [the work] . . . the letters were prominently featured"); *Roy Exp. Co. Establishment of Vaduz, Liechtenstein, Black Inc., A. G. v. Columbia Broad. Sys., Inc.*, 503 F. Supp. 1137, 1145 (S.D.N.Y. 1980) *aff'd sub nom. Roy Exp. Co. Establishment of Vaduz, Liechtenstein v. Columbia Broad. Sys., Inc.*, 672 F.2d 1095

(2d Cir. 1982) ("even assuming that CBS' use of some of the films was quantitatively small, the jury could reasonably have concluded that it was qualitatively great.") "[N]o plagiarist can excuse the wrong by showing how much of his work he did not pirate." *Sheldon v. Metro-Goldwyn Pictures Corporation*, 81 F.2d 49, 56 (2d Cir. 1936).

Regardless, Plaintiff alleged that Defendant downloaded and distributed the pieces, the point of which was to receive a fully playable copy of the movie which Defendant viewed. "After the infringer receives all of the bits of a digital media file, the infringer's BitTorrent client software reassembles the bits so that the file may be opened and utilized." Complaint ¶ 14. This allegation is plausible under the standards set forth in *Twombly*, *Iqbal*, and *Fowler*. Indeed, there is no other plausible reason why Defendant would download and distribute the movie through BitTorrent if its intent was not to view and infringe the movie. Because Plaintiff's allegations are plausible and meet the standards of *Twombly*, *Iqbal*, and *Fowler*, the Court should take these allegations as true. In taking these allegations as true, Plaintiff has properly pled that Defendant directly infringed its exclusive rights under the Copyright Act.

d. No Court in the Country Has Ever Found That Plaintiff's Complaint Fails to State a Claim

Every court to address the issue has held that Plaintiff's Complaint states a plausible claim of direct infringement. *See e.g. Malibu Media, LLC v. John Doe 1*, 2013 WL 30648 at *4 (E.D. Pa. 2013) ("Accepting all factual allegations in the Amended Complaints as true . . . the Court concludes Plaintiff has stated a claim upon which relief can be granted under the Copyright Act."); *Malibu Media, LLC v. Pelizzo*, 2012 WL 6680387 at *1 (S.D. Fla. 2012) ("Having carefully reviewed the allegations in the Complaint and the applicable authorities, the Court will deny the Motion because the Complaint adequately states a claim for copyright infringement."); *Malibu Media v. Roy*, Case No. 12-cv-617 (W.D. Mich.) (denying 12(b)(6) motion); *Malibu Media v. Pratt*, 1:12-cv-00621-RJJ, CM/ECF 31 (W.D. Mich. March 19, 2013) (same); *Malibu Media, LLC v. John Doe*, 2:13-cv-11446-AJT-DRG, CM/ECF 13 (E.D. Mich. Oct. 18, 2013) (same); *Malibu Media, LLC v. Lowry*, 2013 WL 6024371, at *5 (D. Colo. 2013) (same); *Malibu Media, LLC v. John Doe 1*, 2013 WL 30648 at *4 (E.D. Pa. 2013) (same); *Malibu Media, LLC v. Pelizzo*, 2012 WL 6680387 at *1 (S.D. Fla. 2012) (same); *Malibu Media, LLC v. Killoran*, 2:13-cv-11446-AJT-DRG, CM/ECF 13 (E.D. Mich. Oct. 18, 2013) (same); *Malibu Media, LLC v. John Doe*, 2:13-cv-00055-JVB-JEM, CM/ECF 22 (N.D. Ind. August, 16, 2013) (same); *Malibu Media LLC v. Doe*, 2013 WL 3945978 (E.D. Mich. 2013) (same); *Malibu Media LLC v. Gilvin*, 2014 WL 1260110 (N.D. Ind. Mar. 26, 2014) (same); *Malibu Media, LLC v. Sanchez*, 2014 WL 172301 (E.D. Mich. Jan. 15, 2014) (same); *Malibu Media, LLC v. Butler*, 13-cv-02707-WYD-MEH, CM/ECF 31 (D. Colo. April 24, 2014) (same).

V. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests this Court deny the subject motion.

Dated: August 2, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that service was perfected on all counsel of record and interested parties through this system.

By: /s/ *Patrick J. Cerillo, Esq.*